IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5106 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MIRZA MOHAMMED JAFAR ALI KHAN NAJAM-ES-SANI & 1 - Petitioner(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :
MR MR ANAND for Petitioner(s) : 1 - 2.MR DIPAK C RAVAL for Petitioner(s) : 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5
MR DA DESAI, learned AGP for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2 - 3.
MR JITENDRA MALKAN for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 30/03/2006

ORAL JUDGMENT

1. By way of this petition under Article 226 of the Constitution of India, the petitioners have prayed for an appropriate writ, direction and/or order quashing and setting aside the communication by the Deputy Secretary,

GAD, State of Gujarat dated 24-4-1981 as well as communication dated 3-11-1990 and the notices dated 5-9-1992 and 19-5-1993 by which the petitioners were directed to hand over the possession of the properties bearing city survey No.1/764, 1/856 and 1/1033 situated at Khambhat, which runs in the name of the State Government. Petitioners have also prayed for an appropriate order to permanently restrain the respondent authorities from disturbing the title, possession and use of the petitioners so far as the aforesaid properties are concerned. Petitioners have further prayed for a declaration that the petitioners are the owners of the aforesaid properties, more particularly, property bearing city survey No.1/764 (known as Gaukhana and Gaushala), property bearing city survey No.1/1033 (known as Ganji or Ghas Ganji) and that they are the Administrator and Managing Trustee of the property bearing city survey No.1/856 which is Imam Khana Muslim Religious property.

2. At the outset, it is to be noted that the learned counsel appearing on behalf of the petitioners has fairly conceded that the present petition for the aforesaid declaration is not maintainable. However, while relying upon the agreement made on 19th March, 1948 between the

Governor General of India and Nawab of Cambay (Annexure A to the petition) and article 3 of the said agreement to the effect that if any dispute arises as to whether any item of property is the private property of the Nawab or State Property, it shall be referred to such officer with judicial experience as the Dominion Government may nominate and the decision of that officer shall be final and binding on both parties, it is submitted that the order passed by the Collector as well as the State Government which are impugned in the present Special Civil Application are bad in law and that they have no authority to declare the properties in question as Government properties and the said decision is without jurisdiction and therefore, it is requested to allow the present Special Civil Application to that extent.

3. Shri Mihir Thakore, learned senior counsel appearing on behalf of the petitioners has submitted that they are ready and willing to approach the competent authority as per article 3 of the agreement and till then their possession may be protected.

4. Shri Dipan Desai, learned AGP while opposing the present application, has relied upon Article 363 of the Constitution of India and has submitted that this court

has no jurisdiction to decide the dispute raised in the present Special Civil Application. He has also further submitted that admittedly the properties in question are in the name of State Government since more than 30 years and it is the petitioners who have disputed and assailed that the properties in question are of their personal properties and not Government properties and therefore, even as per article 3 of the agreement, they have to approach before the appropriate authority which they have failed till date. It is submitted that the petitioners approached the Hon'ble Chief Minister at the relevant time for mutating their names in the record of rights and to that the State Government has submitted that the same cannot be done as the properties in question are in the name of State Government. It is submitted that there is no decision by the State Government as alleged with regard to the properties in question, it is the petitioners who have disputed the ownership of the properties in question and therefore, it is requested to dismiss the present Special Civil Application.

5. At the outset, it is required to be noted that sum and substance of the petition and the reliefs which are sought in the present Special Civil Application are for

declaration that the petitioners are the owners of the properties in question. This is a petition under Article 226 of the Constitution of India and for such a declaration, the present petition is even otherwise not maintainable under Article 226 of the Constitution of India. It appears from the record that the dispute is with regard to Gaushala and Ganji with Sheds. Admittedly, the aforesaid properties in question are in the name of State Government since more than 30 years. It is the petitioners who are disputing and claiming the aforesaid properties of their private properties. At this stage, Article 363 of the Constitution of India is required to be considered, which reads as under:

> **"Bar to interference by courts in disputes arising out of certain treaties, agreements etc**.(1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, convenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India

or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, convenant, engagement, *sanad* or other similar instrument.

(2) In this Article -

(a) 'Indian State' means any territory recognized before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and

(b) 'Ruler' includes the Prince, Chief or other person recognized before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State.

In view of the above and considering Article 363 of the Constitution of India, the present petition is not maintainable as this court shall not have jurisdiction in any dispute arising out of any provision of a treaty, agreement, convenant, engagement, *sanad* or other similar instrument which was entered into or executed before the

commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, convenant, engagement, *sanad* or other similar instrument.

6. Even, otherwise on going through the agreement entered into between the Governor General of India and Nawab of Cambay on 19-3-1948, more particularly, Article 3, if any dispute arises as to whether any item of property is the private property of the Nawab or State Property, it shall be referred to such officer with judicial experience as the Dominion Government may nominate and the decision of that officer shall be final and binding on both parties. The petitioners have never approach such officer disputing the ownership. The petitioners only approached the Hon'ble Chief Minister at the relevant time for mutating their names and deleting the name of the Government, which came to be rejected by the State Government by aforesaid communications by

informing the petitioners that at the relevant time when the inventory was prepared with regard to properties of Nawab, the properties in question are not included and/or mentioned in the inventory list and that the petitioners would have objected to the same at the time of preparing the inventory list and that the prayer of the petitioners after 30 years cannot be accepted. Thus, the petitioners disputed ownership of the properties in question after a period of more than 30 years and as such as per Article 3 of the agreement it is the petitioners, who are disputing the ownership and claiming the properties in question of their private properties, who have to approach the competent officer/ competent authority which the petitioners have never approached. At this stage, Shri Mihir Thakore, learned senior advocate has submitted that the petitioners would be approaching the competent authority within a period of 15 days and their possession be protected for a period of 15 days till they obtain any appropriate order from the competent authority even qua interim order protecting their possession.

7. For the reasons and considering Article 363 of the Constitution of India, the present Special Civil Application is required to be dismissed as the same is

not maintainable and is accordingly dismissed.

8. However, It will be open for the petitioners to approach the competent authority and at the request made on behalf of the petitioners, interim relief granted earlier is directed to be continued for a period of 15 days i.e. upto 21st April, 2006 so as to enable the petitioners to approach the appropriate authority and obtain interim protection. However, it is observed that this court has not expressed any opinion on merits of the case and continuance of interim relief upto 21st April, 2006 may not be construed in favour of the petitioners and this court has continued the interim relief as the same is continued since 1990 and it is ultimately for the appropriate authority to take appropriate decision even with regard to interim protection. This court has also not expressed any opinion whether such an application before the competent authority is maintainable after so many years. All the questions are kept open and it is ultimately for the competent authority to take such decision. Rule discharged. However, there will be no order as to costs.

(M.R.SHAH,J.)

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